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Re: Microsoft Trial Tunney Act Comments

I am very concerned about the proposed settlement of the antitrust case against Microsoft. I don't think this settlement is in the public interest. After enduring years of litigation and continued anti-competitive action on the part of Microsoft, the public deserves an effective remedy. The proposed remedy, if adopted, will not be effective. The proposed remedy restricts Microsoft's actions very little and allows them to continue the same anti-competitive business practices that have resulted in the bleak software business of today.

The most important and most critical effect of any final judgment in this case should be to restore competitive conditions in the markets affected by Microsoft's unlawful conduct. The proposed settlement is bound to fail in this goal because it is ill-conceived, ambiguous, and full of holes.

Effective relief would be based on principles, not an enumeration of prohibited conduct. Just as a judge must avoid even the appearance of impropriety, Microsoft should be required to avoid even the appearance of anti-competitive conduct. Given its history of unlawful behavior, Microsoft must be held to the highest standards of ethical, pro-competitive behavior. There must also be an effective, efficient, and powerful enforcement authority.

The proposed settlement has none of these properties. Rather it is full of holes, restrictions, and limitations that will make it wholly ineffective:

1. The proposed settlement is confusing and ambiguous. Given Microsoft's history, one must assume that every ambiguity will be interpreted in the most advantageous possible way by Microsoft. This practically ensures future litigation over the meaning of the terms and conditions.
2. The proposed settlement is backward looking. Rather than focus on restoring competitive conditions to the markets as they are now or will be, it focuses on the past.
3. There is no effective means for enforcement. Some sort of oversight board with actual power is necessary, as are actual penalties for non-compliance. The proposed settlement permits only further litigation.
4. The proposed settlement aims to protect the market for personal computer operating systems, but not the market for server operating systems. Should not Microsoft be enjoined from using anti-competitive practices to monopolize the server market in addition to the PC market?
5. The proposed 'Technical Committee' is worthless, in part because of its secrecy. It needs real investigative and oversight powers. It should be a resource for further litigation. It should have the right and responsibility of reporting the behavior of Microsoft to the public.
6. The proposed settlement fails to adequately protect 'open source' competition. As 'open source' software is generally provided to the public with source code as a public service at no charge, it is deserving of the highest protections from unlawful anti-competitive practices. 'Open source' software is commonly written as a hobby by individuals or small associations. The proposed settlement discriminates against open source software by allowing Microsoft to deny access to those with out a 'legitimate business need'. Similarly, the 'reasonable and non-discriminatory' terms for API and communications protocol licensing may be used to discriminate against open source developers and products. Microsoft could impose non-disclosure licensing terms that prohibit distribution of source code, for example.
7. The protections of OEM's are inadequate. The proposed settlement provides maximum protection to only the largest twenty. All OEM's should be treated equally, and price schedules should be published for all to see.

8. The term of 5 years, extensible to 7, of the proposed agreement is inadequate, given Microsoft's record of ignoring such agreements and litigating.
9. Microsoft's competitors need to be protected against the 'Embrace and Extend' strategy of hijacking established standards and modifying them to be incompatible. Microsoft should be enjoined from using these tactics, and rather should be required to work with standards groups. Java and Kerberos are two standards that have suffered this fate in recent years.
10. Recent price increases in volume licensing agreements have demonstrated to the public that the Microsoft monopoly is alive and well despite the ongoing litigation. The final judgment should ensure that pricing is kept at a reasonable level.
11. Microsoft should be enjoined from using patents to prohibit or discriminate against 'Open Source' software. Perhaps Microsoft should be required to license for free 'Open Source' use any patent that it owns or otherwise licenses.
12. Microsoft has been recently trying to leverage its operating systems monopoly and Internet subsidiaries to promote its 'Passport' on-line authentication service. Microsoft should be enjoined from using its currently monopoly to eliminate or prevent competition in the on-line authentication service business.
13. The definition of middleware is poor. Middleware should be defined based upon functionality or character of a product, not on whether it is trademarked.

I have enumerated but a few of the serious limitations of the proposed settlement. The proposed settlement is wholly inadequate and is not in the public interest.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen D. Holland". The signature is stylized with a large, looped 'S' and a cursive 'H'.

Stephen D. Holland